

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER**

_____)	
UNITED STATES OF AMERICA,)	
Complainant,)	8 U.S.C. § 1324c Proceeding
)	
v.)	
)	OCAHO Case No. 96C00027
PEDRO DOMINGUEZ,)	
Respondent.)	Judge Robert L. Barton, Jr.
_____)	

NOTICE OF FINAL PREHEARING CONFERENCE
(December 3, 1997)

Pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 556(c), and the Rules of Practice and Procedure, 28 C.F.R. § 68.13, a prehearing conference will be conducted by telephone in this case at 1 p.m. Central Time on Tuesday, December 23, 1997. The parties previously have been notified orally of the date and time of the conference. The telephone conference will be initiated by my office and is expected to last approximately two hours. A court reporter will be present in my office to record the conference, and a verbatim transcript of the conference will be prepared.

Since this is the final prehearing conference, the parties shall be prepared to discuss the following:

- (1) any pending motions;
- (2) the relevance and necessity of testimony described in the parties' witness lists, and which witnesses, if any, will be offering expert testimony;
- (3) the relevance and admissibility of exhibits listed by the parties in their exhibit lists;
- (4) the statement of disputed issues;
- (5) the possibility of obtaining further stipulations or admissions of fact and/or documents which will avoid unnecessary proof, and advance rulings from the court on the admissibility of evidence;

- (6) the avoidance of unnecessary proof and of cumulative evidence, and limitations on the use of testimony under Rule 702 of the Federal Rules of Evidence;
- (7) the form and substance of the final prehearing order; and
- (8) possible settlement.

See 28 C.F.R. 68.13(a) and Rule 16(c), Fed. R. Civ. Proc.

In a motion filed on December 1, 1997, Respondent has requested an extension of time to amend its exhibit list and has requested a continuance of the trial which is now scheduled to begin on January 12, 1998, in San Antonio, Texas. As per the Rules of Practice, since Respondent's motion was served on Complainant by FAX, any written response by Complainant to this motion must be filed with the Court not later than December 11, 1997. See 28 C.F.R. § 68.12(b). I will then consider and rule on the motion during the December 23 conference. However, until I rule otherwise, the parties should assume that the trial will begin on January 12, 1988, as scheduled, and they should be prepared to proceed at that time.

As provided in the OCAHO Rules, 28 C.F.R. § 68.46, documents submitted as proposed exhibits in advance of the hearing shall be deemed authentic unless written objection thereto is filed prior to the hearing, except that a party will be permitted to challenge such authenticity at a later time upon a clear showing of good cause for failure to have file such written objection. Therefore, pursuant to 28 C.F.R. § 68.46, during the December 23, 1997, Prehearing Conference the parties are ordered to raise any objections to the authenticity of documents submitted as proposed exhibits. Unless such objection is made, all documents submitted as proposed exhibits will be deemed to be authentic.

With respect to any exhibits listed in the respective exhibit lists which have not already introduced in evidence, during the conference I will consider oral motions to admit the exhibits.¹ The sponsoring party shall be prepared to discuss the relevancy of the exhibit and to offer the exhibit

¹ During the April 1, 1997, prehearing conference I received in evidence Complainant's exhibits marked CX-B through E, CX-I, CX-O and Q, CX-BB through LL, CX-MM through CX-PP, CX-SS and TT, CX-VV, CX-XX, and CX-AAA and BBB. PHC(1) Tr. 19. I reserved ruling on the admission of Complainant's other exhibits. I also received in evidence Respondent's exhibits which were attached to Respondent's response to the motion for summary decision. PHC(1) Tr. 21.-22. However, these exhibits were not the same as those identified in Respondent's exhibit list. Therefore, during the conference I will hear motions by the parties, and objections from the opposing party, on the admission of those exhibits which have not been received in evidence.

in evidence during the conference. The opposing party shall be prepared to state any objection to the exhibit. For any exhibit which has not been received in evidence prior to or during the final prehearing conference, the party shall state the name of the witness who will sponsor the exhibit.

With respect to witnesses, both parties will be expected to address the relevancy and necessity of certain testimony described in the witness lists, including objections to the testimony of any witnesses listed by the opposing party. For example, as to Complainant's Second Amended Witness List, I note that Complainant has identified eight potential witnesses who may testify during the hearing and all eight will testify as to penalty. The Court reminds Complainant that cumulative evidence should be avoided. See 28 C.F.R. § 68.40(b) and Rule 403, Fed. R. Evid. As to specific witnesses, Complainant lists Jose Flores, an Assistant United States Attorney, as a potential witness on penalty and is expected to testify "as to the proceedings leading up to the plea agreement by Pedro Dominguez, the execution of the plea agreement, the plea and sentencing, the pre-sentencing report and the application of the sentencing guidelines." Complainant also references six exhibits on which this witness will testify; namely, the original indictment, the superseding indictment, the guilty plea, the transcript of the plea, the judgment and the transcript of sentencing. All six of these exhibits already have been introduced in evidence. Complainant shall be prepared to show how Mr. Flores' purported testimony is relevant to this case.

As to the remaining issues in this case, in view of the Chief Administrative Hearing Officer's (CAHO) November 17, 1997, modification of my October 17, 1997, Order Partially Granting Complainant's Motion for Summary Decision, I may have to revisit an earlier issue that was discussed earlier. With respect to the question of whether Respondent properly could be punished by the imposition of civil penalties both for counterfeiting a document and possessing the same document incident to its creation, during the July 30, 1997, prehearing conference I concluded that the statute authorized a cease and desist order and did not permit imposition of civil penalties for possession. PHC(2) Tr. 52, 54. I further concluded that Complainant also had failed to show that Respondent "possessed" the document within the meaning of 8 U.S.C. § 1324c(a)(2). PHC(2) Tr. 51. I emphasized that my decision was founded on statutory interpretation and not constitutional considerations. I further stated that were Complainant's interpretation of the statute adopted, such application would raise serious constitutional issues, because possession and counterfeiting of documents would appear to involve the same elements of proof and thus would subject the Respondent to double jeopardy. PHC(2) Tr. 33, 35. However, since I rejected Complainant's interpretation of the statute, I did not found my decision on the constitutional issue. Since the CAHO now has modified my earlier ruling, at least to the extent that the pre-September 30, 1996, statute provides for the assessment of civil money penalties for possessing and providing counterfeit and falsely made documents, during the December conference I will consider whether the constitutional issue raised during the July 30 conference now has to be considered. Aside from the constitutional issue, the parties shall be prepared to discuss whether or not the statute should be interpreted to permit assessment of multiple penalties based on counterfeiting, possession, use and providing the very same document.

Following the conference, Complainant shall be responsible, in conjunction with Respondent, for preparing and filing, not later than January 5, 1998, a proposed final prehearing order which shall include the final list of witnesses for each party, the documents admitted in evidence, as well as those remaining on the exhibit list which have not yet been admitted, the stipulations, and the disputed issues of fact and law. See 28 C.F.R. § 68.13(c) and Rule 16(d) and (e), FRCP. The hearing will be governed by the terms of the prehearing order, and in their presentation of evidence the parties shall be limited to the witnesses, exhibits, and issues listed in such Order. The order following a final prehearing conference will be modified *only to prevent manifest injustice*. See Rule 16(e), Fed. R. Civ. Proc.

If a party or party's counsel fails to obey this order, fails to attend the conference without good cause, is substantially unprepared to participate in the conference, or fails to participate in good faith, upon motion by the opposing party or on the Judge's own initiative, sanctions may be imposed on the party and/or counsel, including either dismissal of the complaint or the request for hearing, as appropriate. See 28 C.F.R. §§ 68.1, 68.23, 68.28, and 68.37.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of December , 1997, I have served the foregoing Notice of Final Prehearing Order on the following persons, by first class mail (unless otherwise indicated), at the addresses shown:

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